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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 604.

MARK GRAVES, JOHN P. HENNESSEY and JOSEPH M. MESNIG, as Commissioners, Constituting the State Tax Commission of the State of New York,

Petitioners,

vs.

CARL J. SCHMIDLAPP and ELIZABETH E. GORRIE, as Executors of the Last Will and Testament of EUGENE V. R. THAYER, Deceased.

BRIEF FOR RESPONDENTS

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Statement.

The decedent, Eugene V. R. Thayer, died a resident of New York County on January 1, 1937. His will was admitted to probate and letters testamentary were issued thereunder by the Surrogate's Court of New York County to Carl J. Schmidlapp and Elizabeth E. Gorrie, respondents herein (R. 6). A *pro forma* order entered on the report of an appraiser (R. 5) assessing the tax imposed under Article 10-C of the Tax Law upon the estate of the decedent was made on December 1, 1938 (R. 4). The State Tax Commission appealed to the Surrogate (R. 1) on the ground that the order was erroneous because the report of the appraiser failed to include in the gross estate the value of the property which passed under the exercise of a general testamentary power of appointment conferred upon the decedent by the will of his father, a resident of Massa-

chusetts. On the appeal, the *pro forma* order was affirmed (R. 2), Mr. Surrogate FOLEY writing an opinion which is reported in 172 Misc. 426 (R. 46). The Appellate Division of the Supreme Court, First Judicial Department, unanimously affirmed the Surrogate's decision without opinion (R. 50). The Court of Appeals of the State of New York affirmed the order of the Appellate Division without opinion.

The father of the decedent died a resident of Massachusetts on December 20, 1907, leaving a will which was admitted to probate in Worcester County, Massachusetts (R. 10). His residuary estate he bequeathed in trust, with directions to the trustees to divide the trust fund into as many shares as he might leave children surviving, and to pay to each child the income from one of the shares for life (R. 22). The decedent, Eugene V. R. Thayer, was given the power to appoint a share of the trust by will (R. 22).

The decedent was one of three trustees. For some time the entire trust fund was managed as a unit, but on July 8, 1911, a one-third share of the fund was segregated and was thereafter managed as a separate trust, its value increasing more than the value of the other two shares (R. 10, 13). There were at all times three trustees of all the shares, however (R. 14). All three were originally residents of Massachusetts, and there was never a time when fewer than two of the three trustees have been residents of Massachusetts (R. 14). The decedent never acted nor sought to act as sole trustee of the segregated share (R. 14).

In 1918 the decedent moved to New York and remained here until 1929. As a matter of convenience, but without authorization from the Massachusetts Court (R. 14), he brought the property constituting the segregated share of the trust fund to New York and kept it here in a separate safe deposit box; it was not commingled with his own funds but was at all times kept separate. In 1929 he moved to Illinois and remained there as a resident until 1934, and at that time also he removed the segregated share to Illinois and kept it there until 1934, when he returned to New York

and again brought the securities constituting the segregated share into this state (R. 14).

Annual accounts were separately filed with respect to the said one-third share, after the physical segregation thereof, in the Probate Court of Worcester County, Massachusetts. These annual accounts were rendered by all three trustees and fiduciary income tax returns were also made by all three (R. 35).

The decedent, by his will, exercised in favor of his widow the power given him under his father's will (R. 15).

After the death of the decedent, an account was filed with the Worcester County Probate Court in Massachusetts by the trustees under the will of the decedent's father, and it was then contended on behalf of other parties in interest that the segregation was illegal, and that the decedent's share of the fund was in reality one-third of the total and not the particular securities which he had in his possession as a trustee at the time of his death. The matter was set down for a hearing, but a compromise was agreed upon substantially upon the basis of an equal division of the amount in dispute (R. 10). The effect of the exercise of the power of appointment, therefore, was not to pass title to the entire fund which had been segregated. The validity of the segregation and the question of whether or not the power of appointment was validly exercised over the segregated property rather than over one-third, generally, of the trust fund has never been established.

The Question Presented.

Whether the State of New York has the power to include in the taxable estate of a resident decedent, for the purposes of the New York estate tax, intangible personal property passing under the will of a resident of the State of Massachusetts pursuant to the exercise by a New York resident of a testamentary power of appointment conferred upon him by the will of the Massachusetts decedent.

ARGUMENT.

I. New York may not tax any part of the trust property to which the decedent's power related unless New York conferred or controlled the privilege of transferring it.

If there were no limitations upon the power of a state to tax the transfer of property regardless of whether or not it exercised any control over the transfer, the only question presented in this case would be whether New York had intended by its taxing statutes to levy the tax which the State Tax Commission asserts the right to impose.

However, it is settled beyond dispute that a state may not constitutionally tax property over which it does not exercise any control. The Supreme Court has unanimously held, for example, that a state may not tax real property and tangible personal property situated in another jurisdiction. *Frick* vs. *Pennsylvania*, 268 U. S. 473 (1925). This rule applies with equal force to the taxation of the transfer of property upon the death of its owner or upon the death of a person having certain rights or powers with respect to the property. This limitation upon the powers of the states has been recognized by the Supreme Court in *Curry* vs. *McCanless*, 307 U. S. 357 (1939), at pages 363, 364.

The basis of the rule that a state may not tax real property or tangible personal property outside its borders is that the state in which the property is located has absolute power to control all dealings with it and may grant or deny the power to transfer it. The fact that in the case of tangible personal property the law of the owner's domicile will usually be recognized as controlling its disposition upon the owner's death is not significant, because the recognition of the law of the domicile by the state of situs is a matter of comity which the state need follow only if it wishes to do so. In effect, it merely adopts the law of the domicile as its own with respect to the disposition of the particular property. *Frick* vs. *Pennsylvania, supra* (268 U. S. 473, 491, 494).

Essentially the same principle runs through both the basis for and the limitations upon the power to tax, namely, that the state which seeks to exercise the power must control the transfer which it seeks to tax.

Mr. Justice STONE, concurring in *Farmers Loan & Trust Co.* vs. *Minnesota*, 280 U. S. 204 (1930) at 214, emphasized the fact that a state, in order to sustain a privilege tax, such as an inheritance or succession tax, must exercise control over the transfer. He concurred in the opinion of the majority in that case because, as he said, "the law of Minnesota neither protected, nor could it withhold the power of transfer or prescribe its terms".

This rule was followed by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton*, 272 U. S. 567 (1926). It was there held that a state is without jurisdiction to tax the appointive property as part of the estate of a resident donee of a testamentary power of appointment where the power was created under the will of a non-resident and the property did not have a physical situs within the state. In that case a North Carolina resident (Mrs. Taylor) exercised a testamentary power of appointment created by the will of a Massachusetts resident. In holding that North Carolina could not tax the property passing under the power, the Court said (p. 576):

> "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the State where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina. A State may not subject to taxation things wholly beyond her jurisdiction or control. *Frick* v. *Pennsylvania*, 268 U. S. 473."

II. The State of New York did not confer or control the exercise of the power.

The decedent's privilege of exercising the power of appointment was not conferred by or in any way dependent

upon the laws of New York; it was conferred by and dependent solely upon the laws of Massachusetts. A power of appointment can be effectively exercised only if it conforms with the laws of the donor's domicile, and conversely, the state of the donor's domicile can give effect to the exercise of a power which would not be deemed a sufficient exercise thereof by the state of the donee's residence.

Blount vs. *Walker*, 134 U. S. 607 (1890);

Matter of New York Life Insurance & Trust Co., 209 N. Y. 585 (1913);

Sewall vs. *Wilmer*, 132 Mass. 131 (1882);

Hogarth-Swann vs. *Weed*, 274 Mass. 125, 174 N. E. 314 (1931);

In re Bowditch's Estate, 189 Cal. 377, 208 Pac. 282 (1922).

The property passing under the power of appointment was not owned by the decedent, nor did he have the power to make it his own property or to realize upon it. Accordingly, it did not pass upon his death by virtue of New York law or by reason of a privilege conferred by New York. The privilege was conferred by Massachusetts and Massachusetts could constitutionally tax its exercise. *Gardiner* vs. *Burrill*, 225 Mass. 355, 114 N. E. 617 (1916); *Chanler* vs. *Kelsey*, 205 U. S. 466 (1907); *Whitney* vs. *State Tax Commission* (*Matter of Vanderbilt*), 309 U. S. 530 (1940) at page 538.

In such cases as this the beneficiaries do not receive the property nor does the donee exercise the power by virtue of or under the control of the laws of the state of the donee's residence. *Sewall* vs. *Wilmer, supra.*

In *Blount* vs. *Walker, supra*, it was held by a unanimous court that the courts of the state of a donee's residence had no jurisdiction to declare that the donee's will was duly executed under the laws of the donor's residence or that it was a good execution of the power.

This case is very different from one in which the state of residence of the donee is also the state of residence of the donor of the power of appointment. In such a case, the state of the donee's residence may tax the exercise of the power because its laws conferred the privilege and control the validity of its exercise. *Chanler* vs. *Kelsey, supra; Orr* vs. *Gilman,* 183 U. S. 278 (1902).

The *Wachovia Bank* decision, moreover, indicated (272 U. S. at pp. 574, 575) that the state of the donee's domicile may tax "where the instrument which created the power provides that the appointment must be by will executed according to the law of the donee's domicile, to be proved and allowed there * * *."

New York neither controlled nor conferred the power of appointment exercised by the decedent, Eugene V. R. Thayer, and accordingly, may not claim the right to tax the transfer of the appointive property on the theory that it protected the privilege of exercising the power and transferring the property.

It is significant that the New York tax, moreover, is characterized as being upon the power to transfer property and upon nothing else. *Matter of Vanderbilt,* 281 N. Y. 297, 309, 311, 315 (1939); *Matter of Delano,* 176 N. Y. 486, 494 (1903); *Keeney* vs. *New York,* 222 U. S. 525, 537 (1912).

In this case, the decedent did not own the property and never did, nor can it be said that he was constructively the owner of it. *Farmers' Loan & Trust Co.* vs. *Mortimer,* 219 N. Y. 290, 295 (1916). The only attributes of ownership he had in the property (in his individual capacity) were the right to receive income during his lifetime and the right to dispose of the property at his death.

III. The fact that the decedent died a resident of New York is not sufficient to permit New York to tax the transfer of the appointive property.

The fact that a decedent dies a resident of a particular state is not of itself sufficient to permit the state of domicile to tax all the property which he owned at his death. For example, the state of residence may not tax the decedent's real property situated in another state nor his tangible property situated in another state. This was the unanimous opinion of the Supreme Court in *Frick* vs. *Pennsylvania, supra* and *Keeney* vs. *New York, supra.* The theory in such cases is that the state of domicile does not control the decedent's right of transfer of that property. As we have already pointed out, the decedent herein did not exercise the power of transfer by virtue of the laws of New York nor could the laws of New York, its courts or its legislature add anything to or detract anything from the validity of the exercise of that power.

The only relation of the State of New York to the appointive property was its right to tax the income as long as Mr. Thayer remained a resident of New York. This right, which it could tax during his lifetime, is not enough to permit the estate of the life beneficiary's domicile to tax the corpus of the trust. As was said by Mr. Justice Holmes in the unanimous decision of the United States Supreme Court in *Brooke* vs. *Norfolk,* 277 U. S. 27 (1928) in holding that the state of domicile of an income beneficiary cannot tax the corpus of the trust where another person is the donor of the trust:

> "the property is not within the State, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See *Wachovia Bank & Trust Co.* vs. *Doughton,* 272 U. S. 567, 575."

The appointive property in the case at hand was not within the possession or control of the decedent Thayer in his individual capacity. It was within the constructive possession and control of the Massachusetts Court. *Matter of Sandford*, 277 N. Y. 323 (1938); *Hutchins* vs. *Commissioner*, 272 Mass. 422, 172 N. E. 605 (1930).

Moreover, the decedent in this case had no rights in the appointive property comparable to those which he had with respect to his own real property and tangible personal property situated outside the State of New York. He was not the owner of the appointive property in any sense whatever, unlike the case where a person has a general power of appointment by deed or by will, as in *Bullen* vs. *Wisconsin*, 240 U. S. 625 (1916), or where he has created a trust reserving the right to income and a power of appointment by will, in which case his creditors may set aside the transaction even though it was executed before they extended the credit. Such a power in the creditors of a decedent is equivalent to property in the hands of the decedent—not only the income but also the principal can be reached during his lifetime.

> *Ward* vs. *Marie*, 73 N. J. Eq. 510, 68 Atl. 1084 (1907);
>
> *City Bank Farmers Trust Co.* vs. *Miller*, 163 Misc. 459 (1937), affirmed, 253 App. Div. 707, reversed on another point, 278 N. Y. 134 (1938).

As we have said, a *testamentary* power of appointment conferred by another person is not even constructively the equivalent of ownership of the property subject thereto and is not part of the true estate of the decedent. *Farmers' Loan & Trust Co.* vs. *Mortimer*, *supra* (219 N. Y. 290, 295); *United States* vs. *Field*, 225 U. S. 257 (1921). Not only is the property subject to a general testamentary power of appointment not even constructively owned by the donee, but it is not in any sense a source of wealth to the donee thereof. The separate opinion by Mr. Justice Holmes in the *Wachovia Bank* case is based upon a misconception of

this legal principle. Mr. Justice HOLMES did not dissent from the *Wachovia Bank* case, as is sometimes said. He simply outlined the case of *Bullen* vs. *Wisconsin* and then observed that in the *Wachovia Bank* case the power was equally a source of wealth, in his mind, as the power of appointment was to Bullen. He based this view upon his incorrect statement that "Mrs. Taylor, the donee, had the life interest and the power to dispose of the remainder by a will which she could bind herself to make". He then said that he could not help doubting whether the *Wachovia Bank* case could, therefore, be reconciled with the *Bullen* case. This was not a dissent and simply stated that Mr. Justice BRANDEIS and Mr. Justice STONE concurred "in this view". The reasoning of the "doubting" justices in the *Wachovia Bank* case lay in their belief that the power (a general *testamentary* power, not a power to appoint by deed or by will) could be validly contracted away and thereby operate as a source of wealth to the donee. It is well established both in New York and in Massachusetts that a contract to exercise a testamentary power of appointment in a particular way is invalid as a fraud upon the power and accordingly is unenforceable. *Farmers' Loan & Trust Co.* vs. *Mortimer, supra; Vinton* vs. *Pratt*, 228 Mass. 468, 117 N. E. 919 (1917); Gray, The Rule Against Perpetuities (3d ed. 1915), § 526c.

The power in the *Bullen* case was a general power of appointment by deed or by will. Even where given by a third person, such a power of appointment is the equivalent of ownership and has always been held to be so for all practical purposes. It is no different, in its essence, from a power of revocation retained by a donor of property. As Sugden said and was quoted as saying by Mr. Justice HOLMES in the *Bullen* case, this attempt to distinguish for practical purposes between a general power of appointment and a fee is to "grasp at a shadow while the substance escapes".

The case is quite different with a testamentary power of appointment for in such a case the donee of the power

has no right to the principal of the property and can never in any sense realize upon it. It is not property which he once owned and transferred, reserving the power, so that the transfer was in effect a transfer to take effect at death (*Curry* vs. *McCanless, Bullen* vs. *Wisconsin*), or so that his creditors can reach the principal of the trust. The reason for permitting the state of domicile to tax an *inter vivos* transfer which is for practical purposes not complete until the death of the donor is merely that the law will not permit the owner of an estate to defeat the plain provisions of the inheritance laws by any device which secures to him for life the income, profits, enjoyments and power of disposition thereof. Kidder, State Inheritance Tax and Taxability of Trusts (1934), page 143. The state which would otherwise be deprived of its inheritance tax is, of course, the state where the decedent is domiciled at his death.

If a state cannot validly tax a resident's real property or personal tangible property outside of its jurisdiction although that property is clearly a source of wealth to the decedent, *a fortiori*, it cannot tax property subject to a power of appointment whose exercise itcannot in any way control. In the one case the property is a source of wealth to the decedent but cannot be controlled by the state of domicile; in the case at hand the property not only cannot be controlled by the state of domicile but is not a source of wealth in any sense to the decedent except as a source of income. *Brooke* vs. *Norfolk, supra.*

The effect of a reversal in this case would be that a state may tax property which is not part of the true estate of its decedent or part of his wealth and the transfer of which it cannot prevent nor effect. The decedent Eugene V. R. Thayer was no richer and could have made himself no richer by reason of the power which he held than he would have been had he only had the right to receive the income of the trust during his life.

IV. *Curry* vs. *McCanless* and *Graves* vs. *Elliott* have in no sense overruled the *Wachovia Bank* case.

The *Wachovia Bank* case controls the case at hand, and has never been overruled either directly or indirectly, as the facts and the foregoing discussion reveal. In his opinion in the *Curry* case, Mr. Justice STONE cited the *Wachovia Bank* case as controlling and valid subsisting authority for a different proposition from that which he was considering in the *Curry* case. He did not cast any doubt upon the validity of the *Wachovia Bank* decision (307 U. S. at p. 371).

This was recognized by Mr. Surrogate FOLEY in his opinion below (R. 46), where he says:

> "In discussing this subject of jurisdiction in its recent decision in Curry *v.* McCanless (*supra*), Mr. Justice STONE wrote: 'Whether the appointee derives title from the donor under the common law theory, or from the donee by virtue of the exercise of the power, is here immaterial. In either event the trustee's title under the will was derived from decedent, domiciled in Tennessee (Cf. Wachovia Bank & T. Co. *v.* Doughton, 272 U. S. 567, 71 L. ed., 413, 47 S. Ct., 202). There is no conflict here between the laws of the two states affecting the transmission of the trust property.'
>
> "Thus the court did not overrule its determination in the Wachovia Bank & Trust Company case, but cited it without distinguishment."

Moreover, the *Curry* case and the case of *Graves* vs. *Elliott*, 307 U. S. 383 (1939), established no principle of law not firmly established by unanimous decision of the Supreme Court before the time of the *Wachovia Bank* case:

The right of the state of domicile of the donee of a power of appointment created by himself had been established in *Bullen* vs. *Wisconsin*, a unanimous decision.

The right of the state of domicile of the settlor of a trust who reserved the right to revoke the trust had been established by a unanimous court in *Keeney* vs. *New York*.

The power to tax intangibles having a more or less permanent situs in the taxing state had also been recognized in *DeGanay* vs. *Lederer*, 250 U. S. 376, 382 (1919); see also *Safe Deposit and Trust Company* vs. *Virginia*, 280 U. S. 83 (1929), in which the validity of this doctrine was later accepted as beyond question.

It had already been established that where the donor and the donee were different persons but were domiciled in the same state, the state could tax the exercise of the power by the donee, on the theory that the state happened to control and confer the privilege of executing a will in the form necessary to exercise the power effectively. *Chanler* vs. *Kelsey, supra; Orr* vs. *Gilman, supra.*

Accordingly, there can be no contention that the *Curry* or *Graves* case established any principles of power of a state to tax the transfer of property by one of its residents beyond the power which had already been conceded to the states by the Supreme Court.

V. The decedent was, for the purposes of New York estate taxation, in no sense the owner of the appointed property, as claimed by the State Tax Commission.

The State Tax Commission contends that it is proper to subject to death taxation the property over which the decedent herein exercised the testamentary power of appointment given to him by the Will of his father, because it has been held proper to include in a decedent's gross estate, for the purpose of an estate tax, certain property which was not actually owned by a decedent, such as the proceeds of life insurance; property of which the decedent was a joint tenant; property of which the decedent was a tenant by the entirety; property held in a trust created by decedent over which he reserved a power of revocation.

In each of these cases, the property which was subjected to an estate tax had its origin in the decedent. The

proceeds of insurance were paid for by him. The joint tenancy and the tenancy by the entirety, represented an interest created by the decedent, and the trusts were created by the decedent. That is not the case here. Our decedent had a testamentary power of appointment over property held in a trust created by the Will of a non-resident decedent. He had no rights in this trust except the right to receive income during his lifetime and to appoint it by his Will. He was, in no sense, the owner of the property. *Sewell* vs. *Wilmer, supra.* The precise relationship of the donee of a power of appointment to the trust which gives him the power was set forth by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton, supra* (272 U. S. 567, 574-5), where the Massachusetts rule is stated as follows:

> "Except perhaps where the instrument which created the power provides that the appointment must be by will executed according to the law of the donee's domicile, to be proved and allowed there, the following propositions are established in Massachusetts: 'Personal property over which one has the power of appointment is not the property of the donee, but of the donor of the power.' The appointee takes, not as the legatee of him who appoints, but of the original donor. 'Property in the hands of domestic trustees appointed under the will of a domestic testator, who conferred a power of appointment upon a non-resident, must be distributed according to the law of this Commonwealth and * * * the execution of the power must be interpreted according to our law and in conformity to the power conferred.'"

VI. The contention of the New York State Tax Commission that intangibles subject to a testamentary power of appointment under a non-resident trust have the same status as intangibles owned by the decedent for the purpose of estate taxation in the state of the domicile of the decedent is not supported by the cases cited.

The State Tax Commission further contends that New York, as the State of the domicile of Eugene V. R. Thayer, has the power to impose an estate tax on the property subject to the testamentary power of appointment because intangibles owned by a decedent are taxable by the state of the domicile, wherever located; and to support this contention, the State Tax Commission cites the following cases:

Baldwin vs. *Missouri*, 281 U. S. 586 (1930);

Blodgett vs. *Silberman*, 277 U. S. 1 (1928);

Farmers' Loan & Trust Company vs. *Minnesota*, 280 U. S. 204 (1930);

First National Bank of Boston vs. *Maine*, 284 U. S. 312 (1932);

Beidler vs. *South Carolina Tax Commission*, 282 U. S. 1 (1930);

Graves vs. *Elliott*, 307 U. S. 383 (1939);

Curry vs. *McCanless*, 307 U. S. 357 (1939).

In each of these cases, except the last two, the intangibles that were subject to tax by the state of domicile were owned by the decedent but had their *situs* outside of the state of domicile in a broad sense.

In *Graves* vs. *Elliott*, *supra*, the decedent had set up a trust in the State of Colorado before moving to New York, where she was domiciled at the time of her death. This trust was revocable and the interest retained in the trust by the decedent was tantamount to a fee. Consequently

the property held in this trust was properly held to be a part of the taxable estate of the Settlor in New York.

In *Curry* vs. *McCanless, supra,* the decedent went out of her own state into another state and set up a trust there over which she retained full powers of management and also the power to dispose of the property in trust by will or by contract made by her during her lifetime.

In the case at bar, the decedent never owned the property which the State Tax Commission seeks to tax. The property was owned by his father and left in trust for him with a testamentary power of disposition in our decedent who had no power to dispose of this trust fund at any time during his lifetime and who had no power to make a contract with respect to its disposition. *Farmers' Loan & Trust Company* vs. *Mortimer, supra.*

The State Tax Commission also refers to *Whitney* vs. *State Tax Commission, supra,* as standing for the proposition that the appointive property is subject to estate taxation in New York. In that case, this Court upheld the inclusion in the taxable estate of a New York decedent of property subject to the exercise of a limited power of appointment. In that case, this Court overruled the contention that no tax was imposable because the donee of a limited power could not benefit himself. The case, however, is clearly distinguishable from the case at bar. In the *Whitney* case, the power of appointment had been created by the donee's ancestor, who was also a resident of the State of New York. In that case, the law of New York conferred upon the donee of the power the privilege of disposing of the property left in trust. In the case at bar, the law of New York has nothing to do with the privilege accorded to our decedent of disposing by will of the property left in trust by the Will of his father. Massachusetts law controls that privilege. *Sewall* vs. *Wilmer, supra.*

The State Tax Commission also claims that the fact that the State of New York did not confer upon the decedent in this case the privilege of disposing of the property held in trust under the Will of his father does not affect

the right of New York to subject the appointive property to New York estate tax because, they say, in the *Curry* case this Court justified the Tennessee tax by reason of benefits conferred upon the decedent, and her obligation to contribute to her state of domicile. Here again, the State Tax Commission ignores the important distinction between the case at bar and the *Curry* case. In the *Curry* case, the decedent went out of her own state and set up a trust which she still controlled and which she could dispose of by will or by contract during her lifetime. Furthermore, in the *Curry* case, the property was originally owned by the decedent. In the case at bar, Eugene V. R. Thayer never owned the appointive property and was never in a position to make that property his or to enjoy any right in the property except the right to the income of the property.

VII. The presence in the State of New York of the securities representing the intangible interests held in the trust fund did not confer upon New York the power to include the appointive property in the taxable estate of this decedent.

The petitioners say that when intangibles are brought by the owner within the protection of the laws of another state such other state may subject the intangibles to estate taxation. The only two cases involving estate tax which have been cited by the State Tax Commission are *Curry* vs. *McCanless, supra*, and *Graves* vs. *Elliott, supra*. In the *Curry* case the decedent went out of her own state and set up a trust which was subject to the laws of another state and the devolution of which was governed by the laws of the foreign state. Certainly this was a clear basis for the taxation of the trust fund in the foreign state. In *Graves* vs. *Elliott, supra*, a New York decedent had retained a power of revocation for a trust which she had established in Colorado and which was subject to the laws of Colorado and the

disposition of which was governed by the laws of Colorado. Here again there was a clear basis for the imposition of an estate tax on this trust fund by the foreign state.

The imposition of the tax in both of these cases in the foreign states bears out the contention of the respondent which is that an estate tax may properly be imposed by a state upon property whose devolution upon the death of the creator of the trust results from a privilege conferred by that state.

However, there is another reason why the presence of the securities held in this trust at the time of the death of the decedent does not form a basis for taxation under the New York Estate Tax Law. That reason is that the Constitution of the State of New York expressly prohibits the taxation of intangibles belonging to a non-resident or to a non-resident trust. Article XVI, Section 3 of the Constitution of the State of New York expresses the policy of the State in this regard. This Section reads as follows:

> "Moneys, credits, securities and other intangible personal property within the state not employed in carrying on any business therein by the owner shall be deemed to be located at the domicile of the owner for purposes of taxation, and, if held in trust, shall not be deemed to be located in this state for purposes of taxation because of the trustee being domiciled in this state, provided that if no other state has jurisdiction to subject such property held in trust to death taxation, it may be deemed property having a taxable situs within this state for purposes of death taxation. Intangible personal property shall not be taxed ad valorem nor shall any excise tax be levied solely because of the ownership or possession thereof, except that the income therefrom may be taken into consideration in computing any excise tax measured by income generally. Undistributed profits shall not be taxed."

The Court of Appeals of the State of New York in considering the case at bar decided it on the broad ground that under the authority of the *Wachovia Bank & Trust*

Co. vs. *Doughton, supra,* and *Matter of Sandford, supra,* the principal of a non-resident trust over which a New York decedent exercised a testamentary power of appointment might not lawfully be included in the taxable estate of such New York decedent for the purposes of the New York Estate Tax. This is made clear from the holding of the Court of Appeals in *Matter of Sandford, supra,* where the facts were identical with those in the case at bar. There the decedent was a New York decedent. There the trust over which a power of appointment was given was a Massachusetts trust and in that case too the securities constituting the trust property were located in New York at the time of the death of the decedent. The trustee was a New York resident. That the Court of Appeals disregarded completely the presence of the securities of the Massachusetts trust within the State of New York at the time of the death of the New York decedent as a factor in determining whether the appointed property was subject to New York Estate Tax clearly appears at page 328, where the Court says:

> "The Winchester trust was created by a Massachusetts resident, the trustees are subject to the control of the Probate Court of that State, and all the securities constituting the *corpus* had an actual situs there except for one year prior to the death of the donee of the power and at present have at least a constructive situs there. The trustees' obligation is to account to the Massachusetts court. The actual presence in this State of the certificates or instruments evidencing the intangible property did not afford a basis for taxation. Neither did the removal of the residence of the trustee into this State afford a basis for the imposition of a tax. The transfer of the securities in the trust by the exercise of this power of appointment is not taxable in this State. (*Wachovia Bank & Trust Co.* v. *Doughton,* 272 U. S. 567.)"

The State Tax Commission also claims that the law of the State of New York controls the devolution of the appointive property in this case on the ground that it is

the law of the state having control of the property which governs its devolution, although for reasons of comity, the law of the donor's domicile is applied, and they cite *Bullen* vs. *Wisconsin, supra, Frick* vs. *Pennsylvania, supra,* and the very recent case of *Riley* vs. *New York Trust Company,* 10 U. S. L. WEEK. 4197 (U. S. 1942).

None of these cases stands for this proposition. In *Bullen* vs. *Wisconsin,* Mr. Justice HOLMES made a reference to the *universitas* in connection with the taxation of a trust fund at the domicile of the decedent. In *Frick* vs. *Pennsylvania,* tangible personal property was involved; and in *Riley* vs. *New York Trust Company,* there was no question of comity involved. The question before the Court in the *Riley* case was whether or not a determination made in Georgia was binding on a New York personal representative who did not appear in the Georgia litigation and whether the state of incorporation of a corporation might make a determination as to the domicile of the owner of shares of stock of that corporation although the stock certificates themselves were actually present in another state where the question of domicile had already been decided.

It was clearly the opinion of this Court in *Wachovia Bank & Trust Co.* vs. *Doughton, supra,* that it is the law of the domicile of the creator of a testamentary power of appointment which governs the devolution of the property subject to the power of appointment. At page 575, Mr. Justice MCREYNOLDS said:

> "The exercise of the power of appointment was subject to the laws of Massachusetts and nothing relative thereto was done by permission of the state where Mrs. Taylor happened to have her domicile. No right exercised by the donee was conferred on her by North Carolina."

Conclusion.

The rule laid down by this Court in *Wachovia Bank & Trust Co.* vs. *Doughton,* 272 U. S. 567, and followed by

the Surrogate's Court of New York County in excluding from the decedent's gross estate the value of the intangible personal property held in the Massachusetts trust and passing under the power of appointment exercised by the decedent, should be applied and the judgment of the Court of Appeals of the State of New York affirmed.

Respectfully submitted,

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 604.—October Term, 1941.

Mark Graves, John P. Hennessey and Joseph M. Mesnig, as Commissioners, Constituting the State Tax Commission of the State of New York, Petitioners,
vs.
Carl J. Schmidlapp and Elizabeth E. Gorrie, as Executors of the Last Will and Testament of Eugene V. R. Thayer, Deceased.

On Writ of Certiorari to the Surrogate's Court of the County of New York, State of New York.

[March 30, 1942.]

Mr. Chief Justice Stone delivered the opinion of the Court.

We are asked to say whether the due process clause of the Fourteenth Amendment precludes New York from taxing the exercise, by a domiciled resident, of a general testamentary power of appointment of which he was the donee under the will of a resident of Massachusetts, the property appointed being intangibles held by trustees under the donor's will.

Respondents' decedent died a resident of New York, where his will was probated and letters testamentary were issued. Decedent's father had previously died a resident of Massachusetts, where his will had been probated. By his will the father bequeathed his residuary estate in trust to divide the trust fund into as many shares as he should leave children surviving. To his son, the New York decedent, he gave a life estate in one share and a general power to dispose of that share "by will".

The son was also one of the three testamentary trustees. For some years they managed the trust property as a single trust fund, but in 1911 his one-third share was segregated and he was permitted by the other trustees to manage it as a separate trust, although all continued as trustees and as such accounted to the Massachusetts Probate Court for the administration of his share of the fund. From 1918 to 1929 the New York decedent resided

in New York; from then until 1934 he resided in Illinois, when he returned to New York where he resided until his death in 1937. Throughout he kept in the state of his residence the paper evidences of the intangibles comprising his share of the trust. At the time of his death it consisted wholly of receivables and corporate stocks and bonds. By his will decedent appointed his share of the trust fund to his widow, and the New York tax authorities in computing the tax included in the decedent's gross estate the intangibles bequeathed to her under the power.

Article 10-C of the New York tax law, by § 249-n, imposes an estate tax "upon the transfer of the net estate" of resident decedents. Under this statute the net taxable estate is arrived at by deducting from the gross estate, as defined by § 249-r, the specified deductions allowed by § 249-s. Section 249-r, so far as relevant, provides:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .

"7. To the extent of any property passing under a general power of appointment exercised by the decedent (a) by will . . ."

An order of the New York Surrogate's Court, 172 Misc. 426, reduced the estate tax assessed against the decedent's estate by excluding from his gross estate the share of the trust fund passing to the widow by the exercise of the power, on the ground that the state was without constitutional authority to tax the exercise by a resident donee of a power of appointment created by a nonresident donor, citing *Wachovia Bank & Trust Co.* v. *Doughton*, 272 U. S. 567. The New York Court of Appeals affirmed the order without opinion, but certified by its remittitur that it held that the taxing statute as sought to be applied in this proceeding violates the Fourteenth Amendment. We granted certiorari, 314 U. S. —, because of the importance of the question presented.

For purposes of estate and inheritance taxation the power to dispose of property at death is the equivalent of ownership. *Buller* v. *Wisconsin*, 240 U. S. 625; *Whitney* v. *Tax Comm'n.*, 309 U. S. 530, 538; see Gray, Rule Against Perpetuities, 3d ed. 1916, § 524. It is a potential source of wealth to the appointee. The disposition of wealth effected by its exercise or relinquishment at death is one form of the enjoyment of wealth and is an appropriate subject of taxation. The power to tax "is an incident of sovereignty and

is coextensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation". *McCulloch* v. *Maryland*, 4 Wheat. 316, 429. Intangibles, which are legal relationships between persons and which in fact have no geographical location, are so associated with the owner that they and their transfer at death are taxable at the place of his domicile where his person and the exercise of his property rights are subject to the control of the sovereign power. His transfer of interests in intangibles, by virtue of the exercise of a donated power instead of that derived from ownership, stands on the same footing. In both cases the sovereign's control over his person and estate at the place of his domicile and his duty to contribute to the financial support of government there, afford adequate constitutional basis for the imposition of a tax. *Curry* v. *McCanless*, 307 U. S. 357; cf. *Graves* v. *Elliott*, 307 U. S. 383.

These were not novel propositions, when they were restated in the *McCanless* and *Elliott* cases,[1] and they were challenged then, though unsuccessfully, only on the ground that the transfer of the intangibles was subject to taxation in another state where they were held in trust. But the contention that the due process clause forecloses taxation of an interest in intangibles by the state of its owner when they are held in trust in another state was rejected in *Bullen* v. *Wisconsin*, *supra*. In that case a fund had been given in trust reserving to the donor a general power of revocation and the disposition of the trust income during life. This Court held that upon his death an inheritance tax could be levied by the state of his domicile although the trustee and the trust fund were outside the state.

In numerous other cases the jurisdiction to tax the use and enjoyment of interests in intangibles regardless of the location of the paper evidences of them, has been thought to depend on no factor other than the domicile of the owner within the taxing state. And it has been held that they may be constitutionally taxed there even though in some instances they may be subject to taxation in other jurisdictions, to whose control they are subject and whose

[1] See Orr v. Gilman, 183 U. S. 278; Chanler v. Kelsey, 205 U. S. 466; Bullen v. Wisconsin, 240 U. S. 625; Saltonstall v. Saltonstall, 276 U. S. 260, 271; cf. Reinecke v. Northern Trust Co., 278 U. S. 339, 345; Chase National Bank v. United States, 278 U. S. 327, 337; Tyler v. United States, 281 U. S. 497, 503; Porter v. Commissioner, 288 U. S. 436, 444.

legal protection they enjoy.[2] And such interests taxable at the domicile of the owner have been deemed to include the exercise or relinquishment of a power to dispose of intangibles. *Chanler* v. *Kelsey*, 205 U. S. 466; *Bullen* v. *Wisconsin*, *supra*; *cf. Orr* v. *Gilman*, 183 U. S. 278; *Saltonstall* v. *Saltonstall*, 276 U. S. 260.

Decedent's complete and exclusive power to dispose of the intangibles at death was property in his hands in New York, where he was domiciled. *Graves* v. *Elliott*, *supra*. He there made effective use of the power to bestow his bounty on the widow. Its exercise by his will to make a gift was as much an enjoyment of a property right as would have been a like bequest to his widow from his own securities. See *Helvering* v. *Horst*, 311 U. S. 112, 117. For such enjoyment of property rights, through resort to New York law, decedent was under the highest obligation to contribute to the support of the government whose protection he enjoyed in common with other residents. Taxation of such enjoyment of the power to dispose of property is as much within the constitutional power of the state of his domicile as is the taxation of the transfer at death of intangibles which he owns.

Since it is the exercise of the power to dispose of the intangibles which is the taxable event, the mere fact that the power was acquired as a donation from another is without significance. We can perceive no ground for saying that its exercise by the donee is for that reason any the less the enjoyment of a property right, or any the less subject to taxation at his domicile. The source of the power by gift no more takes its exercise by the donee out of the taxing power than the like disposition of a chose in action or a share of stock, ownership of which is acquired by gift.

But respondents argue that because here the power was bequeathed by a Massachusetts will, which placed the intangibles subject to the power in a Massachusetts trust, there was nothing within the jurisdiction or control of New York which could be deemed subject to its taxing power. If by this is meant that the

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[2] See Kirtland v. Hotchkiss, 100 U. S. 491; Hawley v. Malden, 232 U. S. 1; Cream of Wheat Co. v. Grand Forks, 253 U. S. 325; Blodgett v. Silberman, 277 U. S. 1; Virginia v. Imperial Coal Sales Co., 293 U. S. 15; First Bank Stock Corp. v. Minnesota, 301 U. S. 234, 239-40, and cases cited; Stewart v. Pennsylvania, 338 Pa. 9, affirmed 312 U. S. 649; *cf.* Carpenter v. Pennsylvania, 17 How. 456 (before Fourteenth Amendment); also Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204; Baldwin v. Missouri, 281 U. S. 586; Beidler v. South Carolina, 282 U. S. 1 (all recognizing the power of the state of domicile to tax). In the case of income taxation see Lawrence v. State Tax Comm'r., 286 U. S. 276; New York *ex rel.* Cohn v. Graves, 300 U. S. 308; Guaranty Trust Co. v. Virginia, 305 U. S. 19.

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power was ineffective because its exercise by the New York will did not conform to the requirements of the will creating the power and defining the manner of its exercise, or to the laws of Massachusetts governing the disposition of intangibles, no such question is before us. We must take it that the New York courts assumed, as we do, that the power had been so exercised by the New York will as to confer on the widow the right to demand the property of the trustees in Massachusetts, and that even upon that assumption they held that the exercise of the power in New York could not constitutionally be taxed.

Whether the New York tax statute would apply if the New York will were ineffective to transfer the intangibles because it failed to comply with the requirements of the Massachusetts will or statutes, is for the New York courts to decide. Whether in such a case the statute could be constitutionally so applied is a question not presented by the record. But if, as is assumed, the power has been effectively exercised, the New York will is the implement of its exercise, made effective as a will by New York law whose aid the decedent invoked for the exercise and enjoyment of the property right conferred on him by the Massachusetts will. Its exercise is a subject over which the sovereign power of taxation extends.

Admittedly, under prevailing notions of choice of law in the courts of these two states, the law of the donor's domicile, here Massachusetts, may be looked to in New York in determining whether, in some respects at least, there has been a valid and effective execution of the power of appointment. *Sewall* v. *Wilmer*, 132 Mass. 131; *Hogarth-Swann* v. *Weed*, 274 Mass. 125, 130; *Hillen* v. *Iselin*, 144 N. Y. 365, 378; *In re New York Life Ins. & Trust Co.*, 209 N. Y. 585. But a transfer which has in fact been effected by recourse in part to the law of New York is not free of taxation there because the power might have been exercised elsewhere or by some other mode, or because it may be necessary for the transferee to invoke the laws of Massachusetts in order to acquire control of the property. A transfer in one state of a chose in action or a share of stock may be taxed there even though the transferee in order to enjoy its benefits must depend in part upon the law of the state of the debtor or of the corporation. *Blodgett* v. *Silberman*, 277 U. S. 1, 10-17. Here the relationship of the power to Massachusetts does not leave New York without sufficient control over the donee and his exercise of the power to support its con-

stitutional authority to tax. For the fact remains that he as a resident, enjoying the protection of New York's laws and owing to it the duty of financial support, has disposed of wealth by a will executed and probated in New York with the same result as if he had owned the property. This transmission of wealth at death by a resident is not a forbidden source of revenue to the state. *Wachovia Trust Co.* v. *Doughton, supra,* on which respondents rely, denied the constitutional power of a state to tax the effective exercise of a testamentary power in circumstances like the present. The only grounds for the decision were that the intangibles held in trust in another state, which were the subject of the power, had no situs in the state where the domiciled testator had exercised the power by his will; that its exercise was subject to the laws of Massachusetts where the will donating the power and establishing the trust had been probated, and that no "right" exercised by the donee was conferred by the state of his domicile where it was exercised.

The conclusion there reached and the reasons advanced in its support cannot be reconciled with the decision and the reasoning of the *Bullen,* the *McCanless* and the *Elliott* cases. It is plain that if appropriate emphasis be placed on the orderly administration of justice rather than blind adherence to conflicting precedents, the *Wachovia* case must be overruled. There is no reason why the state should continue to be deprived of revenue from a subject which from the beginning has been within the reach of its taxing power; a subject over which we cannot say the state's control has been curtailed by the due process clause of the Fourteenth Amendment. No interest which could be served by so rigid an adherence to *stare decisis* is superior to the demands of a system of justice based on a considered and a consistent application of the Constitution. See *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406, footnote 1; and cf. *Helvering* v. *Mountain Producers Corporation,* 303 U. S. 376, 387. The *Wachovia* case should be and now is overruled and the constitutional power of New York to levy the present tax is sustained.

Reversed.

Mr. Justice ROBERTS concurs in the result only because he considers himself bound by the decisions in *Curry* v. *McCanless,* 307 U. S. 357 and *Graves* v. *Elliott,* 307 U. S. 383. Otherwise he would vote to affirm.